Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1997

Mary J. Clement, Petitioner

v.

Virginia Board of Bar Examiners

On Petition for Writ Of Certiorari
To The United Sates Court of Appeals for the
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Mary J. Clement
Counsel of Record, Pro Se
816 W. Franklin St.
VCU Box 842017
Richmond, VA 23284
(804) 828-1050

47pp

QUESTIONS PRESENTED FOR REVIEW

The petitioner's claim in this case is based on the American with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et. seq.

1. What statute of limitations should a federal court use when hearing a case brought by a bar examination candidate for compensatory damages against a state licensing agency for failure to comply with ADA standards of "reasonable accommodations?" Should it be one year based upon the Virginia Disabilities Act (exclusive state remedy for employment discrimination), 51.5-40, et seq., Code of Virginia, 1950, as amended, which gives only equitable remedies? Or, should it be under ADA for compensatory damages including pain and suffering that are more aligned with personal injury claims under § 8.01-243, Code of Virginia, 1950, as amended, which has a two-year limitation?

2. Upon what date does the statute of limitations begin to run? When the board of bar examiners grants an accommodation or when the board tells the bar candidate that he or she did not pass the bar exam and can never sit for another exam?

3. What is the threshold for summary judgment when the appellee utilized no expert witnesses and is permitted to prevail over the plaintiff's experts opinions which clearly show that the candidate for the bar examination was not given reasonable accommodations under ADA and *D'Amico v. New York State Board of Law Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993)?

4. Is the Va. Code Ann. § 54.1-3930 that limits the number of times a bar candidate can sit for the Virginia bar examination to five times in conflict with the ADA?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.
[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

There is no corporate entity involved with counsel. The petitioner is not a publicly held corporation or other publicly held entity. There is no publicly held corporation that has a direct financial interest in the outcome of the litigation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[X] For cases from **federal courts**:
The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 10, 1997.

[X] No petition for rehearing was filed in a timely fashion for this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Bill of Rights
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 701 (1994) Rehabilitation Act of 1973

42 U.S.C. § 12101 (a) (4)
(U)nlike individuals who experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who had experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.

42 U.S.C. § 12102 (2)
The term "disability" means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12111 (8)
The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111 (9)
The term "reasonable accommodation" may include . . .

appropriate adjustment or modification of examinations.

42 U.S.C. § 12112 (b)(6)
Discrimination means using employment tests . . . that screen out or tend to screen out an individual with a disability . . . unless the standard, or other selection criteria, test is shown to be job-related.

42 U.S.C. § 12131 (1)(B)
Public entity means any department, agency, special purpose district, or other instrumentality of a State or States or local government.

42 U.S.C. § 12131, et. Seq. "Americans with Disability Act of 1990" ("ADA")

42 U.S.C. § 12131 (2)
Qualified individual with a disability means an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132
No qualified individual with a disability shall . . . be subjected to discrimination by any such (public) entity.

Va. Code Ann. § 8.01-243 (A) (1992)
. . .every action for personal injuries, whatever the theory of recovery, . . . shall be brought within two years after the cause of action accrues.

Va. Code Ann. § 51.5-40
No otherwise qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied

the benefits of, or be subjected to discrimination under any program or activity receiving state financial assistance or under any program or activity conducted by or on behalf of any state agency.

Va. Code Ann. § 51.5-46 (A) (B) (Virginians with Disabilities - exclusive state remedy for employment discrimination)
(A) Any circuit court having chancery jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorney's fees . . . Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.
(B) An action may be commenced pursuant to this section any time within one year of the occurrence of any violation of rights under this chapter. However, such action shall be forever barred unless . . . filed by registered mail or written statement of the nature of the claim with the potential defendant or defendants within 180 days of the occurrence of the alleged violation.

Va. Code Ann. § 54.1-3928
Board shall issue a license to practice law in this Commonwealth to every applicant who successfully passes the examination on all the subjects required and complies with the requirements of this chapter and the rules of the Board.

Va. Code Ann. § 54.1-3930
Any applicant who fails an examination given after July 15, 1960, may be reexamined not more than four additional times showing to the Board that he has diligently pursued the study of law since the former examination and he remains otherwise

qualified under the provisions of this article. However, the Board may allow an applicant who has taken the examination five times to take additional examinations when in the discretion of the Board, the applicant has shown mitigating circumstances which constitute good and sufficient cause for the applicant's failing the prior examination.

STATEMENT OF THE CASE

The petitioner's claim in this case is one based on the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq. Under the code the plaintiff is a "qualified individual with a disability" because she is an individual with both a documented learning disability and an eye-impairment who, without reasonable modifications to the rules for time limits placed on the state bar examination meets the essential eligibility requirements to practice law in the state of Virginia, having graduated from an accredited law school in August of 1990. See 42 U.S.C. § 12102 (2) and 42 U.S.C. § 12111(8).

Since the petitioner had the difficulties on the standardized testing (LSAT) which is a prerequisite to law school, she applied for the performance program at the University of Richmond, School of Law. She had to use her previous graduate degrees and publications as proof of being able to do law school work. She was admitted into a summer performance program in 1986. For the final exams, one professor gave all students nearly double time to complete the final exam. Having received the highest grade in the Criminal Law class and near the top in the second class, she was admitted into the regular program on a part-time basis because she was under contract to teach at Virginia Commonwealth University. It was because of these difficulties that the petitioner's disabilities were documented so late in life in 1986.

The Virginia Board of Bar Examiners is an agency of the Supreme Court of Virginia that administers the bar examination and evaluates the character of bar candidates for licensure within the Commonwealth. See Va. Code Ann. § 54.1-3928. As a "public entity," they are included within the meaning of Title II of ADA and 42 U.S.C. § 12131 (1)(B).

In December 1990, the petitioner, as a bar exam candidate, produced documentation indicating that she had a learning disability and requested removal of all time limits (self-paced and more than double time) to accommodate the fatigue factors associated with her disabilities for the upcoming February 1991 exam. Although her documentation requested unlimited time, she was only permitted one extra hour per three-hour exam for a total of eight hours of testing per two days of testing. Compared to the nonimpaired student who was given a three-hour exam in the a.m., two hour lunch and then a three-hour exam in the p.m. over two days for a total of six hours of testing per day.

When petitioner called the bar examination office to say that the accommodations offered were not in keeping with her expert documentation, a staff person who administered the exam stated that many persons with learning disabilities have passed the exam under those circumstances. Thereby justifying the practice and encouraging the petitioner to go ahead and take the exam despite her misgivings concerning the lack of appropriate individual accommodations. See 42 U.S.C. § 12111 (9) and 42 U.S.C. § 12131 (2).

When requesting to take the bar for the fourth time, the petitioner was told by the board that it relies heavy on historical documentation such as accommodations given in law school. Prior to that time historical information was never requested by the examiners in determining accommodations on prior exams.

Relevant documentation was not requested by the board until July 1993. By that time the law school had destroyed the records which indicated what accommodations were given by the school. One associate dean had a recollection of time and a half given on his exams but was "plainly wrong" in terms of the candidate's memory of self-paced testing with additional lunch and restroom breaks to make nearly an eight-hour day for a three-hour exam.

The original plan for the fourth bar exam was to have double time only for the multi state multiple choice exam. The essay portion of the state exam was to have no extra time. That meant that both sections were to be completed in one day. The aid that was given by the secretary of the board was to have a Dictaphone and a typist. Unfortunately, the typist was allowed a word processor or computer for typing. The typist was a recent high school graduate who did not understand the petitioner's voice nor the legal terms used. Upon the completion of her job, the typist gave to the petitioner a document filled with blank spaces and misinterpretations. The petitioner had to rewrite the answers and return it to the typist who then had to retype the entire document. Given this unfortunate situation, the secretary of the board permitted the petitioner to finish the essay portion of the Virginia exam on the fourth day at the headquarters in Richmond. There, the secretary was skilled at using her computer so the petitioner could focus on answering questions instead of the production of the document.

Petitioner filed a complaint with the United States Justice Department. See 42 U.S.C. § 12132. The petitioner argued that there was no process for determining accommodations. There was no meaningful review; it was trial and error at the expense of the bar candidate. In addition, when the bar examiners changed the essay portion of the exam to longer questions requiring more written answers and thus impacting her disability, those changes

were never taken into consideration for the new adjustments that were needed.

Finally, on the fifth exam, the board permitted double time over a four-day period but provided no breaks or lunch time. So, the six hours were all in one block of timed testing. It was also stated for the first time that there was a five-time rule and this was the last time the petitioner could take the exam. See Va. Code Ann. § 54.1-3930. Petitioner took the exam but her fatigue factor was so high that the additional time that could have been used for test taking had to be used for resting her eyes.

By the time the Justice Department contacted the petitioner, she had taken the bar for the fifth time and was protesting the five-time rule. The petitioner argued that the rule meant five equal chances and the first several times were not equal chances. The Justice Department attorney agreed with the petitioner and put her recommendation on her supervisor's desk before she left for another position. The board never responded to her letter and another bar exam past. The materials with the Justice Department were lost.

After the fifth exam, the petitioner produced additional expert evaluations documenting a previously existing eye impairment which also contributed to the unusual fatigue factor and requested that the double time not be in a block of time of six hours but that the time be spread throughout the day such as three hours in the a.m. followed by a two-hour lunch/rest and then another three-hours in the p.m. Under their policy of discretion, the Virginia Board of Bar Examiners permitted her one more chance to take the exam. Their accommodation was three hours of testing followed by one hour of lunch/rest and then three hours of testing for four consecutive days. The petitioner again reminded them of the expert's recommendation. Thus, the board's final

accommodation for the sixth exam came in a letter dated February 16, 1995, just days before the actual exam.

In a letter dated April 27, 1995, the petitioner was notified that she had failed to pass the February 1995 bar examination. In addition, she was reminded that she had failed the examination five times (the limit imposed by statute) and was granted this sixth time by special permission but that it was the final time. That meant the petitioner had been terminated and could not reapply.

During the four-year period of time that petitioner requested accommodations (Feb. 1991 through Feb. 1995) the petitioner was contacted by the secretary of the board via a telephone who "pistol whipped" her in order to get her to agree to her accommodations. The petitioner was led to believe that the secretary for the board had the ultimate power in granting accommodations. When the petitioner asked to use a computer, he said, "No." She even agreed to purchase one for the board. He still said, "No." When petitioner requested to have a face-to-face meeting with the board to explain her unique needs, the secretary of the board said, "No." Petitioner was never informed that the secretary had only been given limited authority to make decisions by the board and that she should petition the board. Then, the secretary of the board requested she put their agreement in writing as if it was the original request and represented the full story behind the conversations. Most of these so-called negotiations occurred a few days before the bar exam such that the petitioner was always left wondering if she should accept the conditions so that she could continue her final studying for the exam.

The board's ultimate decision concerning accommodations did not reflect an orderly and logical deductive reasoning process as evident by the request for law school accommodations on the

fourth exam instead of the first bar exam. In addition, throughout the process of seeking accommodations, the recommendations of the experts were laid aside by the board by justifying that it was not appropriate for a person seeking admission to a profession where compliance with deadlines is critical to ask for an untimed format (self-paced at least double time format) for test taking (Brief of Appellee, p. 18). Rather than observing the recommendations of experts, the volunteer lawyers on the board substituted their own opinions as to how much time the bar candidate needed for taking the bar examination.

The entire process of seeking accommodations was hidden and riddled with uncertainty. The petitioner was doubtful as to what the accommodations would be for each exam. Whereas most bar candidate's only responsibility was to study for the exam, the petitioner found that she also had to advocate her needs and argue up until the last minute before the exam. In talking with other bar examination candidates with learning disabilities, one person expressed the uncertainty of his award of an accommodation by asking her, "Is this a dance? Do they take one step and then you are allowed to take a step? Or, is this an offer you can't refuse?"

The process of feedback on past exams so as to prepare for the next exams was equally confusing. Rules about seeing a bar examiner were not made public. She later found out about the consultation process, called a paper review, while taking her third bar review course. An outside practicing attorney came to discuss his expertise mentioned in passing what he called a "paper review." Upon that attorney's information and after taking the third bar exam and not passing, she had her own opportunity for a "paper review" with a bar examiner. However, he did not go over her exam nor did he indicate what she needed to study in order to improve her chances of success. Moreover, her experience was in sharp contrast to how he described how he

handled these paper reviews in his oral deposition. Another hidden rule was that a bar examiner would only see a person once throughout their history of taking bar exams. That became a shield to shut out her out when in fact, others received those services.

The board held all the power and their own beliefs set the standard. Even with documentation from an eye-doctor explaining abnormal fatigue and orbital pain from an eye impairment, there was no understanding. One of the board members when polled said "we all get fatigued!" and therefore the petitioner should not have any rest day between bar exam days even though that was the actual practice in law school.

The Plaintiff then filed for compensatory damages for lost employment opportunities, lost wages and benefits, humiliation, emotional pain and suffering under ADA on April 26, 1996 in federal district court. The defendant cited a Fourth Circuit case [*Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993)] for the proposition that the one-year statute of limitations as stated in the Virginia Rights of Persons with Disabilities Act, 51.5-40, et seq., Code of Virginia, 1950, as amended, should control. However, the *Wolsky* claim was one based solely on 504 of the Rehabilitation Act, not one based on the ADA. Since *Wolsky* was related solely to the Rehabilitation Act (29 U.S.C. § 701) and not the new ADA that was specifically created to fill in the gaps in the law, the question was open as to the appropriate statute of limitations to apply in an ADA claim in Virginia.

The petitioner argued that the Virginia Act, modeled after the Federal Rehabilitation Act, limited the remedies available to an individual suing for discrimination under it. For example, section 51.5-46 (A) (B) specifically limits compensatory damages to

exclude any damages for pain and suffering because it is considered an exclusive state remedy for employment discrimination. Code of Virginia, 51.5-46, 1950, as amended. The ADA, on the other hand, permits compensatory damages which include pain and suffering. Remedies that include pain and suffering are more aligned with personal injury claims rather than equitable remedies, and thus under § 8.01-243 (1992) the two-year statute of limitations should be used.

The petitioner also cited a United States Supreme Court case that instructed courts to select the "one most appropriate statute of limitations for all section 1983 claims." *Wilson v. Garcia*, 471 U.S. 261, 275 (1984). The Supreme Court concluded that the unifying theme of the Civil Rights Act of 1871, is that it "recognizes the equal status of every '*person*' subject to the jurisdiction of any of the several states . . . A violation of that command is an injury to the individual rights of the person." Id. At 277 (emphasis in original). Likewise, an ADA claim pleading compensatory damages of a personal nature, i.e., pain and suffering and humiliation, is most analogous to a personal injury claim, thereby permitting a two-year statute of limitation pursuant to Virginia law.

The judge ruled that it was time-barred because it had been over one-year. The one-year deadline began to run from the time the board made the last accommodation on February 16, 1995, instead of April 27, 1995. The petitioner had argued that the limitation period for bringing claim under ADA began to run on the date the employee receives definite notice of termination representing the employer's official position. *Smith v. United Parcel Service of America, Inc.*, C.A.2 (N.Y.) 1995, 65 F.3d 266. The petitioner pointed out to the court that a notice of accommodation was not a termination in the sense spoken of in *Smith*. What was definite, and unequivocal was the notice in the

letter dated April 27, 1995 that informed the petitioner that she had not passed and could not reapply.

If the United States District Court Judge had not time barred the case, he would have permitted the bar examiners to prevail through summary judgment. In his mind, the accommodations were reasonable. He was unwilling to discern what the experts were trying to instruct him through their affidavits. This was in part from his own confusion between a learning disability and mental impairment as is evident from the following statements he made at the hearing for summary judgment:

It seems to me a sort of a sad commentary that there's a person who probably could never pass the Bar, I mean could never effectively practice law even if she passed the Bar, and it looks like just passing the Bar was sort of a trophy sort of pursuit of her which is commendable. But, it seems to me that, she had a Ph.D., a J.D., was a college professor, and has all sorts of degrees bestowed upon her, there is a limit to what can be done to accommodate people. (Appendix B, p. 13a.)

The rule that summary judgment may be granted where there is no genuine issue of material fact is well-established. Yet, in this case, there were affidavits on the one side that were directly opposed to the facts supplied by the other side. Unfortunately, this case was not heard by U.S. District Judge Thomas H. Hagan, who has stated that neither party is entitled to judgment as a matter of law because one must be vigilant in applying ADA's standards to insure that the statute is applied fairly and properly. *U.S. v. Becker C.P.A. Review, Ltd.*, D.D.C., No. 92-2879, 12/21/93.

The Court of Appeals for the Fourth Circuit expressed no opinion on the merits of Petitioner's contention that the district

court erred by applying a one-year period of limitations following the Fourth Circuit's opinion in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993). Rather, they went to the merits of the case concerning reasonable accommodations with regard to the bar examination and compared her accommodations with other nonimpaired students instead of what the professionals had requested. The court failed to notice that when the board finally did match more closely the professionals requests for the sixth bar examination, petitioner got a score of 134 on the multi state and that score is passing in several states including the District of Columbia.

The Appeals Court relied on erroneous information when they stated that the law school had accommodated at time and a half. Whereas time and a half has been the usual accommodation for some students with disabilities, the law requires that each person be accommodated based on individual needs determined by experts in the field. The reality is that Dr. Ipsen's letter of 1986 requested unlimited time. Had a historical review been completed in 1991 for the first bar exam, Dr. Ipsen's full letter would have been in the folder at the law school had it not been destroyed. It would not be logical to have such a disparity in requests for accommodation and the actual accommodation without some other justification. See Appendix C.

In addition, as Dr. Hopkins pointed out in his letter to the board recalling how he had verified Dr. Ipsen's testing and her professional opinion as to the need for unlimited time, to have time and a half over so many hours would by necessity be double time. Time would have to be given for restroom breaks, food breaks, rest periods, and other necessities.

The Appeals Court was not dealing with the whole of Dr. Ipsen's letter of 1993 when they took out of context her statement

"consideration be given to extending the time . . . beyond the usual time and a half." As her letter shows in Appendix D, she reminded the board that her original recommendation of "the removal of time limits was determined as an appropriate academic adjustment." Politely, she pointed to the fact that the law requires providing appropriate academic adjustments to be determined on an individual basis. Since the petitioner, at that time this letter had been written had failed the bar exam three times, Dr. Ipsen pointed to the obvious - "time and a half was not enough." She also reminded them that a person, like the petitioner, who has short term auditory memory deficits fatigue faster than those who do not. For Dr. Ipsen, the recommendation of double time spread out over four days was closer to what she had recommended in her earlier letters that were ignored. Thus, statements of Dr. Ipsen were taken out of context for the purpose to mislead.

A trial would have helped clarify many of these issues. The petitioner had prepared a video to show how her eyes lose their ability to focus upon the same part of a word (difficulty sustaining near-visual function such as reading, computer work and how that contributes to abnormal fatigue and orbital pain) after 20 minutes. There are some things that are best explained in pictures as opposed to words. But, a trial was never granted.

REASONS FOR GRANTING THE WRIT

This court is being asked to consider this case for four major reasons: (1) determine ADA rights, (2) correct errors and regulate uniformity in the lower federal courts, (3) evaluate the process, and (4) correct violations in the ADA law.

DETERMINE ADA RIGHTS

The petitioner is one of many persons with disabilities who are

discriminated against based on their disabilities. According to the Secretary General of the United Nations, Kofi Annam, more than 500 million men, women and children suffer some mental, physical or sensory impairment such that people with disabilities are one of the world's largest minorities. However, the movement to enhance disability prevention, rehabilitation and other services to fight against prejudice, discrimination and ignorance have been slow.

In the United States, the first major legislation was the Rehabilitation Act of 1973. Persons with disabilities in schools and colleges were protected by Section 504 of the Rehabilitation Act of 1973. Thus, many schools and colleges began to implement academic adjustments which accommodated them. Specifically, in Section 504, Reg. 104.44, (c) institutions of higher education were mandated to ensure that exams measure an otherwise qualified student's abilities and not reflect the disabilities. That meant that students were to be tested in their areas of strength, not weakness. This practice encouraged the movement of identifying different intelligences and enhancing total brain integration.

Because this 1973 Act targeted populations that were the very severe physically and mentally disabled, it left those with milder forms of disabilities to fend for themselves. These individuals, like the petitioner, had mild disabilities when compared to the whole of the human experience but still had difficulties with standardized or time tests such as those used in professional schools. When bar examination candidates tried to sue bar examiners, they lost their cases of discrimination because the courts argued that licensing boards were not specifically covered under the Rehabilitation Act and therefore, did not have to comply. *Woodward v. Virginia Board of Bar Examiners*, 454 F. Supp. 4 (E.D. Va. 1978), aff'd, 598 F. 2d 1345 (4th Cir. 1979).

Persons who are barred from lucrative professions like law and medicine only because they could not pass a specific final test when they had completed successfully several years of study in a profession became the concern, among many others, for another major piece of legislation – The Americans with Disabilities Act ("ADA"). To correct this unreasonable hurdle, the ADA, in Title II, named boards and licensing agencies to give reasonable accommodations and in Title III covered private versus state agencies.

It is important to consider the history of the ADA law for it is considered the most profound law concerning people with disabilities. It is the Civil Rights Act for disabled for their life, liberty and pursuit of happiness. The ADA was not a mirror image of the Rehabilitation Act even though the definitions of disabilities are the same. ADA was new, and separate. It was to have greater power of enforcement to remove barriers from persons like the petitioner who had successfully fulfilled all requirements to practice law save this one last trial by ordeal which would not have been as difficult for her if she had been accommodated appropriately. The ADA was enacted as a refuge for persons who had been discriminated against based on the fact that they differ from the norm. 42 U.S.C. § 12101 (a) (4).

Licensing boards knew the ADA was coming when it was signed into law in 1990. They also knew that they were purposefully included. They also had many national and state authorities that they could turn to assist them in creating a fair and equitable test for all candidates if they were willing to learn.

Since the petitioner was not purposefully signaled out for this discrimination and more students will be coming through the system asking for what has been given to them in their educational experience, it is important to create a better, more fair system

now. Taking this case may insure that for others.

CORRECT ERRORS AND REGULATE UNIFORMITY

By taking this case, the Court can help correct the errors in the lower court. One side argues that the petitioner is first a Virginian with a disability and therefore must come under the more restrictive act in terms of its statute of limitation and remedies as it applies primarily to employment. The petitioner, on the other hand, argues that this is not a case of employment discrimination. It is a case of a violation of her civil rights under ADA where her individual needs were not reasonably accommodated by a licensing board with the power to deny her ability to practice law. Because she is a citizen of the United States, she also comes under the ADA and should be able to have the full effect of those remedies.

In addition, the statute of limitations for the 4th Circuit (one year under *Wolsky*) is in direct conflict with the two-year statute of limitations in the 7th Circuit [*Bush v. Commonwealth Edison Co.*, 990 F.2d 928 (7th Cir. 1993)], the 10th Circuit [*Baker v. The Board of Regents of the State of Kansas*, 991 F.2d 628 (10th Cir. 1993)], and the 2nd Circuit [*Morse v. University of Vermont*, 973 F.2d 1222 (2nd Cir. 1992)]. In those cases, the argument was that federal discrimination actions are most analogous to personal injury actions under state law and so that statute of limitation was applied from that source, which was also a two-year statute of limitation.

EVALUATE THE PROCESS

The United States Department of Justice was given the responsibility of monitoring compliance with ADA. But, enforcement of ADA has been difficult. Taking this case and clarifying some of the issues, will help many.

The petitioner is not alone. What happened to her has happened to many others. The United States Justice Department is inundated with many types of ADA cases including bar examiner cases. The petitioner's materials were received and assigned but got lost in the change of personnel at the Justice Department. One agent said that they could do "all bar exam" cases and have full plates but they were mandated to take other kinds of complaints under ADA. It is unreasonable to think that this agency can continue to help licensing boards create a process in keeping with due process.

For example, the petitioner, like many other students with disabilities, has found that bar examiners misuse the term "reasonable accommodations" to met the needs of the test giver instead of the test taker. They purposefully gave the professionals' opinions no merit. When the specialists continued to insist upon at least double time, the bar examiners offered the petitioner double time starting from 7:00 a.m. to 7:00 p.m. for two days for a bar exam. An offer which violated the law which requires observance of recommendations made by experts based on the needs of the individual involved, not based upon what is convenient for the board. The petitioner was discriminated against repeatedly and required to work harder to prove that she had the ability to pass the bar examination because she had disabilities that they did not want to accommodate. See Va. Code Ann. Section 51.5-40.

Students with disabilities face greater challenges and expenses by being forced into court in order to receive the basic rights afforded to them under ADA. A good example is Ms. Bartlett who had a 21-day trial with the New York bar examiners to get double time and the use of a computer. *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997). Presently, that case is being appealed. A greater burden is placed

on the bar candidate to prove the ability to practice law through unfair testing standards, when in actuality performance in law school would be a better predictor of competence than the performance on an inequitable standardized test.

With so many cases to consider, the Justice Department has few resources that examination candidates can use to help licensing boards provide a process for determining accommodations and a meaningful review of that process. Occasionally, justice is given through an enlightened judge who can instruct the other lawyers that they are in no position to countermand, for example, the eye doctor's opinion as to what is appropriate accommodation in *D'Amico v. New York State Board of Bar Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993). It took a judge to teach the bar examiners, who hold all the power, that taking an exam over a four-day period instead of over a normal two-day period is not outrageous and is within the letter and spirit of ADA.

Other candidates, like the petitioner, have complications that can only be understood through face-to-face meetings with enlightened board members who will consult the experts. Instead we utilize volunteer bar examiners who have no experience in education, testing, working in universities, or law schools where allocating appropriate accommodations is standard policy and practice. It may be time to rethink their function as volunteers.

Historically speaking, in the last half of the nineteenth century, there was a time when the legal professional standards were at an all-time low and less-than-professional lawyers were not strictly a phenomenon of western states. Admittance to practice law in some states was dependent upon whom the bar candidate knew. In some places it was the committee of three from the local bar that examined the candidate and one of the requisites for

admission was the ability to tell two funny stories, one for men only or the price of drinks. Thus, one of the reforms was to recommend law school education in place of apprenticing. The growth of law schools has been outstanding. Because these schools come under strict scrutiny by accreditation groups such as the American Bar Association, there has been standardized legal education. Given these newer developments of law school education, knowledge about intelligence and brain functioning, and the need to provide more alternatives for others with documented disabilities, perhaps it is time to rethink where the legal profession has been in the past and where and how it can develop in the future.

In addition, many states have statutes that limit the number of times a bar candidate can take the bar exam. This then permits states that do not follow ADA in either spirit or law to hide behind their statutes limiting the number of times a bar candidate can take a bar examination. In this case appropriate accommodations were never even approached until the sixth attempt at taking the bar exam. This compounds the difficulty of going to another state to take their exam because they, too, may have restrictions on the number of times a candidate can take the exam.

It does not matter how many times the petitioner may have taken the bar exam under unfair circumstances, only when she is given an equitable chance based on the recommendations of the experts will her abilities be properly assessed. Until then, the fact that she could not pass under the circumstances given to her should not be used as a punishment or a restraint on her ability to practice law. It is mandatory that she be given the appropriate accommo-dations based on expert opinion in order for it to be a fair test of her ability to practice law in the State of Virginia or any other state.

CORRECT VIOLATIONS IN THE ADA LAW

By taking this case, the Court can correct some of the misunderstandings and violations of ADA. For example, 42 U.S.C. § 12112 (b) (6) says that you have to have job related tests and not just a test for the sake of a test especially if it screens out persons with disabilities. The standardized testing in bar exams is content relevant but the testing itself is not job related. Thus, standardized testing for lawyers is a violation of 42 U.S.C. § 12112 (b) (6).

Standardized testing has come into a world of its own pushed in part by the many students seeking to be admitted into colleges, universities, and professional schools. It has been used as a predictor of future achievements but others have questioned its validity. Bar examiners, like many other licensing examiners, have called upon professional test writers who are not skilled in the content of the material as much as the misuse of language to create illusions. In review courses, for example, the bar candidates are told to watch for questions where there will be no right answer. What the bar candidate has to do is chose the best of the worst answers. Thus, the bar exam becomes a test in speed, accuracy of reading and guessing. Like hazing for a fraternity, bar candidates go through the imposed ordeal; those who pass are elated while those who aren't chosen for the closed fraternity wonder why?

The reality is that the standardized test is not job related. The petitioner never got into law school on standardized tests. Never passed any of her courses by standardized tests. She did pass Trial Practice with an A- by being the prosecutor in a mock trial but that was not done by a standardized test. It was done by actually doing the lawyering skills from opening to closing statements, putting on the case in chief, cross examining the

witnesses, etc. So, where is the logic in having standardized tests for admittance into the legal profession?

In summary, this Court should take this case to clarify what rights and process are due to the disabled under ADA with licensing boards. In addition, the errors in the lower federal courts and the uniformity in the circuit's courts can best be addressed by this Court. It would be in the best interest of all parties for the court to hear this case so that other valuable people with disabilities will be able to contribute to the practice of law, as well as all other areas which are confined by a lack of adherence to the ADA and other laws applicable to persons with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mary J. Clement.

Date: Feb. 9, 1998

APPENDIX A
UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARY J. CLEMENT,
Plaintiff-Appellant,

V. No. 96-2479

VIRGINIA BOARD OF BAR EXAMINERS
Defendent-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-96-363-3)

Submitted: September 25, 1997

Decided: October 10, 1997
Before LUTTIG, MICHAEL. and MOTZ,Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Carolyn P. Carpenter, CARPENTER & WOODWARD, P.L.C., Richmond. Virginia. for Appellant. Lee Melchor Turlington, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

CLEMENT V. VIRGINIA BOARD OF BAR EXAMINERS

OPINION PER CURIAM:

Mary J. Clement appeals from the district court's order granting the employer's motion for summary judgment in this Americans with Disabilities Act (ADA) claim under 42 U.S.C.A. §§ 12101-12117 (West 1995). Clement sued the Virginia Board of Bar Examiners (Board), claiming that they had discriminated against her on account of her learning disability. The district court concluded both that Clement's claim was barred by the applicable statute of limitations* and that the Board was entitled to summary judgment on the merits of the claim. The district court held that even assuming her suit was timely filed, the Board had made "reasonable accommodations" for Clement's disability in administering the bar examination. Because she had not passed the bar examination notwithstanding those accommodations, concluded the court, Clement could not show that she was otherwise qualified. As a result, the district court granted summary judgment in favor of the Board on Clement's ADA claim.

To establish a violation of the ADA arising from her difficulties with the Bar examination, Clement was required to show that she was disabled: that she was, otherwise qualified for Bar membership; and that the Board blockaded her from membership due to discrimination solely based on her

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*Clement also appealed the district court's ruling regarding the applicable statute of limitations. Clement contends the district court erred by following this court's opinion in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993), and applying a one-year period of limitations. Clement suggests that "'the most analogous'state statute of limitations" would be the Virginia statute for personal injuries because her claim most resembles a claim for tortious interference with a contractual relationship. *Wilson v,.Garcia*, 471 U.S. 261, 268 (1985); *see Pandazides,v.Virginia Bd.of Educ.*, 13 F.3d 823, 829 (4th Cir. 1994). Because we conclude that the Board provided Clement with reasonable accommodations with regard to the bar examination, we express no opinion on the merits of Clement's contention with regard to the statute of limitations.

disability. *See Doe v.University of Maryland Med.Sys.Corp., 50* F.3d 1261,1265(4th Cir. 1995); *Tyndall v. National Edu. Ctrs., 31 F.3d 209,212 (4th Cir. 1994).*
National Educ. Ctrs., 31 F.3d 209.212 (4th Cir. 1994). Given the existence of a disability, which is not at issue in this case. the next question is whether Clement was qualified for membership.See *Williams v. Channel Master Satellite Sys.,Inc 101* F.3d 346, 349 (4th Cir. 1996), *cert.denied.* 65 U.S.L.W. 3781 (U.S., May 27, 1997) (No. 96-152 1). Clement, as plaintiff in this ADA case, bears the burden of showing that she was capable of meeting the qualifications for membership with reasonable accommodation. To meet this burden, she must show that a reasonable accommodation by the Board would enable her to pass the bar examination. *See Tyndall,* 31 F.3d at 213.

It is at this point that the district court concluded that Clement's claim could not survive summary judgment. The Board allowed Clement to take the bar examination six times. Each time, the Board granted Clement's requests for accommodations to minimize her disability's effect on her performance. Moreover, the Board increased the accommodations each time Clement suggested that the prior accommodations had not been sufficient. The Board contacted her law school to determine what accommodations the school had made with regard to her examinations there. After doing so, the Board granted her more time and more rest than she received during law school examinations. Ultimately. on her final attempt to pass the bar examination, Clement was afforded twice the allotted time over a four-day period with three hour rest periods between the two sessions on each day. The district court did not err in concluding that this was a "reasonable accommodation" of Clement's disability on the part of the Board.

The thrust of Clement's contention on appeal is that the Board acted unreasonably in not granting every accommodation she requested. Before her final attempt at the examination, Clement suggested that she be allowed a full day of rest between each day of testing. The Board offered a reasonable compromise by granting Clement three times the ordinary amount of rest during a testing day combined with twice the total time allotted to other candidates.

Clement also contends that the Board ignored the analysis *of Clem*ent's needs performed by Dr. Wayne Pharr, a doctor of optometry, and Shyla Ipsen, the coordinator of the Virginia Commonwealth University Reading/Child Study Center. Dr. Pharr submitted that Clement needed "additional time spread out over additional days with rest breaks." Clement received that accommodation. Similarly, Ipsen recommended that "consideration be given to extending the time . . . beyond the usual time and a half." Clement received more than that extension. The Board did not ignore the suggestions of individuals who had evaluated Clement's abilities.

As a result, we have no difficulty concluding that the district court did not err in granting summary judgment in favor of the Board on the ground that they had provided Clement with "reasonable accommodations." We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARY J. CLEMENT,

Plaintiff,

V. CA No. 3:96CV363

VIRGINIA BOARD OF BAR EXAMINERS,

Defendant.

HEARING ON DEFENDANT'S
MOTION FOR SUMMARY JUDGEMENT

Before: Judge Richard L. Williams

October 2, 1996
Richmond, Virginia

HALASZ REPORTING
Court Reporters
P. 0. Box 1644
Richmond, Virginia 23218-1644
(804) 741-5215

Reported by:
Lisa M. Kull

Appearances:

CAROLYN & WOODWARD
By: Carolyn P. Carpenter, Esq. And Leslie A. Coughenour, Esq.
attorney, of counsel for the Plaintiff

OFFICE OF THE ATTORNEY GENERAL
By: Peter R. Messitt, Esq.
attorney, of counsel for the Defendant

(This matter came on before the Honorable Richard L. Williams, Judge, Eastern District of Virginia, Richmond Division, commencing at 10:03 a.m., October 2, 1996.)

THE CLERK: Civil Action No. 3:96CV363,

Mary J. Clement v. Virginia Board of Bar Examiners. Ms. Carolyn P. Carpenter and Ms. Leslie A. Coughenour represent the Plaintiff. Mr. Peter R. Messitt represents the Defendant. Are counsel ready to proceed?

MS. CARPENTER: Yes.

MR. MESSITT: Yes

THE COURT: We are here on the Defendant's Motion for Summary Judgment. Suppose you proceed to address that, Mr. Messitt? And the order of things that I want to hear is the Statute of Limitations issue.

MR. MESSITT: Yes, sir.

THE COURT: Address that, if you will.

MR. MESSITT: The Statute of

Limitations would bar the Plaintiff's entire claim for all Bar examinations. And the Statute of Limitations that applies to this case is the one year Statute of Limitations.

We cited in our brief, we cited the Court to a Fourth Circuit decision,

Wolsky v. the Medical College of Virginia, which was a case under the Rehabilitation Act. And in that case, Your Honor, the Fourth Circuit said that the Virginia statute that is most analogous to the Federal Rehabilitation Act is the Virginia statute that provides for rights of persons with disabilities, that the Virginia statute prohibits discrimination against disabled people on the basis of their disability. And the Court said that because Virginia has a particular statute on point dealing with discrimination against disabled people, that statute is most analogous to the Rehabilitation Act which also prohibits, of course, discrimination against disabled people on the basis of a disability.

THE COURT: Does Ms. Carpenter agree it's a one-year period of limitations?

MR. MESSITT: Well, in her opposition memorandum she didn't contest that point. She argued that she would meet --

THE COURT: You mean that the kick-in date was the 27th? The consequences -

MR. MESSITT: Exactly.

THE COURT: -- of the discriminatory conduct were realized as

opposed to the date that the discriminatory acts occurred?

MR. MESSITT: Exactly. I think Your Honor just put your finger on the most important point. Is that the date that the discriminatory act occurred is the date that the Board of Bar Examiners violated the ADA, if it violated it at all. And what the Plaintiff claims is the discriminatory act is the Board's failure to give her a reasonable accomodation to take the bar examination. So when it gave her only four days to take the bar exam, rather than the seven days she requested, if that's a discriminatory act, and of course we don't think it is, but that's the date when the Board made her take --

THE COURT: Well, those dates are, 2-16-95, that was the date of the alleged discriminatory act, and the consequences of the act became known on 4-27-95, and suit was filed on 4-26-96, right?

MR. MESSITT: So it was more more than a year prior to.

THE COURT: That's the significant chronology. Let me hear from Ms. Carpenter on this point.

MS. CARPENTER: Good morning, Judge.

In terms of the Statute of Limitations, what we did, Judge, is supplement our response yesterday. We would ask that you take that into consideration as well as, even this morning, I have another case to cite for Your Honor, which is the Pandazides case, No. 2, which was decided by the Fourth Circuit in 1994.

There the Court looked at the issue, the Fourth Circuit looked at the issue of compensatory damages as well as the Statute of Limitations, and really said that impliedly Wolsky had been overruled, that the Franklin v. Gannett County decision by the United States Supreme Court really said the Plaintiff gets the full panoply of remedies under the ADA, under any of the rehab acts. And, therefore, I think you have to back out the Statute of Limitations as well. So if you have, if in essence this is a tort, it is, in fact, a personal injury. So that you have to look at the personal injury Statute of Limitations under Virginia law. So that I think that the Pendecedes case really says the Wolsky case has been impliedly overruled, if not specifically overruled.

It says that the Evans case that was previously decided by the Fourth Circuit was specifically overruled by Franklin v. Gannett County. For those reasons I don't think we can look specifically at Wolsky and say that the rehab act, that you have to look at the rehab act, and under the law in this circuit under the rehab act the Statute of Limitations is only one year.

I think the Statute of Limitations now, based on the state of the law, is two years. So we really go back two years from April 26, 1996. And the Pandazides case says you really have to look at the way the case is plead in terms of whether it is a personal injury or whether the person is simply asking for ethical relief.

Ms. Clements is asking, did plead her case with respect to asking for compensatory damages and damages for pain and suffering. So the state of the law at this point, and I apologize for not being clearer on that in our response and in our supplementary response, I think is that the Statute of Limitations, with respect to the ADA giving the full panoply of remedies, also means that it is a personal

injury. And the personal injury Virginia statute would apply.

THE COURT: All right. Thank you. I have considered your late filing. And I am sustaining the Defendant's motion to dismiss the case because the claim is time-barred.

The discriminatory acts occurred on February 16, 1995 and suit was filed on April 26, 1996, more than one year after the discriminatory acts occurred. And my ruling is that there is a one-year applicable Statute of Limitations in this case.

The consequences of the discriminatory acts became known on 4-27-95. That is not the triggering event for the running of the Statute of Limitations. And while I am dismissing the case because it's time-barred, had I not done so, and reached the substance of the Motion for Summary Judgment on whether or not reasonable accommodations had been made to accomodate Ms. Clements, I would rule as a matter of law that more than reasonable accomodations were made to accomodate her.

I want to commend the Bar for being as

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sensitive as it was to her needs in corresponding with the law school, finding out what they had done to accomodate her, and doing the extraordinary, going to extraordinarily lengths to give her the opportunity to pass the Bar. it seems to me sort of a sad commentary that here's a person who probably could never pass the Bar, I mean could never effectively practice law even if she passed the Bar, and it looks like just passing the Bar was sort of a trophy sort of a pursuit of her's which is commendable. But, it seems to me that, she has a Ph.D., a J.D., was a college professor, and has all sorts of degrees bestowed upon her, there is a limit to what can be done to accomodate people. I commend the Bar for what it did in this case. That order will be entered. Counsel will each receive a copy of it. Recess Court until 11:00.

REPORTER'S CERTIFICATE

I, Lisa M. Kull, hereby certify that the foregoing is a true and accurate transcription of my shorthand notes taken in this matter.

"s/ Lisa M. Kull"

Lisa M. Kull Notary Public
Commonwealth of Virginia at Large

HALASZ REPORTING

APPENDIX C - November 18, 1986

Dean Thomas A. Edmons
T.C. Williams School of Law
University of Richmond, VA 23193

Dear Dean Edmons:

One of your law students, Mary J. Hageman, asked me to communicate with you concerning her unique needs. Mary referred herself to the Virginia Commonwealth University (VCU) Reading/Child Study Center last June because of difficulties completing academic tasks under time constraints. The Woodcock-Johnson Psycho-Educational Battery (WJ) was administered to Mary to determine whether or not she had a learning disability. The results of the evaluation indicated that Mary had a border-line weakness in visual-perceptual speed which measured accuracy and fluency. Because of the\is process weakness, a recommendation to remove time constraints from testing procedures was made. Support for such a recommendation appears in the Rehabilitation Act of 1973, Reg. 104.44, (C).

Course examinations: In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure.)

Therefore, I am requesting that all time limits on testing, including course examinations at your school be removed for Mary.

If we can be of further service to you in working with Mary, please do not hesitate to contact us.

Sincerely,
Shyla M. Ipsen, Coordinator
Virginia Commonwealth University

APPENDIX D - DR. IPSEN'S LETTER OF 1992

December 27, 1992
Virginia Board of Bar Examiners
W. Scott Street, III
Suite 303, Mutual Building
Ninth and Main Streets
Richmond, Virginia 23219

Dear Virginia Board of Bar Examiners:

Dr. Mary J. Clement has requested that I, as the Coordinator of Services for Students with Disabilities at Virginia Commonwealth University, write a statement concerning her disability.

Dr. Clement has a history of a disability and a history of academic adjustments. She was assessed and diagnosed as an individual with a learning disability in June of 1986. Dr. Clement has strengths in oral language and abstract reasoning, but weaknesses in short term auditory memory and visual-perceptual speed.

As you are no doubt aware, persons with disabilities are protected by Section 504 of the Rehabilitation Act of 1973 and the American Disabilities Act. In Section 504, Reg. 104.44, (c) institutions of higher education are mandated to ensure that exams measure an otherwise qualified students ability and not reflect the disability. For this reason, the removal of time limits was determined as an appropriate academic adjustment for Dr. Clement. Decisions to provide academic adjustments are determined on an individual basis, and in Dr. Clement`s case just extended time e.g. time and a half was not enough. Therefore, I am requesting that consideration be given to extending the time for Dr. Clement beyond the usual time and a half generally provided because the aforementioned amount of time may discriminate against her. In addition, persons with short term auditory memory typically fatigue faster than those who do not have short term auditory memory deficits. For this reason, an academic adjustment in the scheduling of Dr. Clement`s examination(s) e.g. two days in lieu of one is reasonable.

Thank you for any support and assistance you might give Dr. Clement to ensure that she has an equal opportunity to demonstrate her knowledge and skills on your bar exam.

If I can be of further assistance, please do not hesitate to contact me at (804) 367-1139 VOICE/TDD.

Sincerely,

Shyla M. Ipsen, Coordinator